**UNITED STATES OF AMERICA**
**NATIONAL LABOR RELATIONS BOARD**

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| ERNESTO CALVILLO,<br><br>Petitioner,<br><br>ARAKELIAN ENTERPRISES, INC. DBA ATHENS SERVICES,<br><br>Employer,<br><br>and<br><br>INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 396,<br><br>Union. | NLRB Case No. 31-RD-223309. |

**EMPLOYER ARAKELIAN ENTERPRISES, INC.'S REQUEST FOR EXTRAORDINARY RELIEF AND REVIEW OF REGIONAL DIRECTOR'S DECISION TO BLOCK RD PETITION**

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Pursuant to Sections 103.20, 102.67(c), 102.67(j), and 102.71 of the National Labor Relations Board's ("Board" or "NLRB") Rules and Regulations, Respondent Arakelian Enterprises, Inc. d/b/a Athens Services ("Athens"), by its attorneys Epstein Becker Green, hereby submits this Request for Extraordinary Relief and Request for Review of Regional Director Mori Rubin's ("Regional Director") refusal to follow Section 103.20 of the Board's Rules and Regulations.

**Case 31-RD-223309 ("Pacoima Petition") has been blocked for 25 months and counting.** However, on July 31, 2020, the policy and regulatory authority under which the Pacoima Petition had been blocked was eliminated by revisions to Section 103.20 of the Board's Rules and Regulations ("the Current Rule"). Nevertheless, on August 5, 2020, the Regional Director notified the parties that she was refusing to apply the current Section 103.20 to the Pacoima Petition and instead was going to continue to block the processing of the Pacoima Petition even though the regulatory authority for her to do so had been eliminated by the Board. The Board should grant this request for review because it raises a substantial question of law and policy in that the Regional Director acted in direct contravention to the Rules and Regulations and has departed from officially reported Board precedent by refusing to follow the Section 103.20, unblock the Pacoima Petition, schedule the election and tally the ballots. Rules and Regulations, § 102.71(b)(1)(ii). Moreover, on its face, the Regional Director's action is arbitrary and capricious. Rules and Regulations, § 102.71(b)(3). Accordingly, Respondent requests that the Board order the Regional Director to apply Section 103.20 and unblock the Pacoima Petition.

Respondent further requests that the Board expedite its review of Respondent's Request for Review pursuant to Section 102.67(j) as this Request for Review will have far reaching

implications for all currently pending petitions raising a question of representation that were filed and blocked before the revised Section 103.20 took effect.

## I. INTRODUCTION.

The Pacoima Petition has been blocked for an incredible two years and counting. Athens brought this alarming situation to the Board once before, in a Request for Review filed before the Current Rule had been finalized, requesting that the Board provide much needed, and overly delayed, relief to the employees whose rights are being compromised by the extreme delay. The Board ruled on the Request for Review after the Current Rule had been finalized but before it was effective, stating that it was "troubled by the extreme delay" and acknowledging the Regional Director's action "raises many of the concerns that led the Board to recently adopt changes to the blocking charge policy." Nevertheless, the Board ultimately found Athens' request was premature because "[t]hose amendments are not effective until July 31, 2020, however."

After the Current Rule became effective, Athens again requested that the Regional Director unblock the Pacoima Petition, but once again, the Regional Director denied the request. This time, the Regional Director concluded that, notwithstanding Section 103.20's express elimination of the prior petition processing blocking authority, the Administrative Procedures Act ("APA") prohibits retroactive application of rules, and therefore she can continue to exercise her discretion under the old eliminated blocking charge policy to block the Pacoima Petition.

However, a regulatory rule is not, as the Regional Director suggests, unlawfully retroactive merely because it is applied to conduct that occurred prior to the rule's enactment. Rather, to be impermissibly retroactive, the rule must alter the legal consequences for past conduct. In this regard, it is well-established that procedural rules that merely change the way a case is adjudicated or processed do not fall within the retroactivity prohibition of the APA. Because the Current Rule

merely changes how and when representation petitions are processed – and not the validity of the petition or the blocking charges – it is a procedural rule that does not fall within the APA's retroactivity prohibition. Thus, the Current Rule can and must be lawfully applied to the Pacoima Petition.

In fact, *not* applying the Current Rule to the Pacoima Petition is arbitrary and capricious because it results in unlawful disparate treatment of the Pacoima Petitioner. Specifically, were any similarly situated petitioner to file a representation petition today, that post-Rule petition would be processed, while the Pacoima Petition would not be, even if there were no material differences in the petitions or petitioners other than timing. It is unlawful, patently unfair and wildly arbitrary and capricious to enforce the Current Rule in a manner that would allow any similarly situated petitioner to invoke the Current Rule but not the Petitioner or Athens.

What the Regional Director's decision also misses is that, as the Casehandling Manual makes clear, the decision to block, even under the old blocking charge policy, is a fluid, ongoing analysis that requires reevaluation and possibly alteration whenever circumstances materially change. Here, of course, circumstances have materially changed as the policy (and regulatory authority) on which the Regional Director justified her earlier decision had been eliminated. It defies the core purposes of the Act to delay an election based on eliminated policies the Board has expressly found infringe upon employees' guaranteed Section 7 rights.

Finally, even if the Board were to find the APA's retroactivity prohibition precludes the application of the Current Rule here, the Board still has the authority to make this rule retroactively applicable to pending petitions through adjudication since it would not be manifestly unjust to do so. On the contrary, it would be manifestly unjust *not* to make the Current Rule apply to all pending cases through adjudication. Failure to do so would mean that all petitions pending and blocked at

the time of the Current Rule's effective date would continue to languish in blocking charge purgatory until the blocking charges are finally adjudicated. As this case demonstrates, that could be months or even years after the Current Rule was enacted. Thus, while the law is clear that application of the Current Rule to such petitions is not unlawfully retroactive, if the Board finds otherwise, it should at the very least exercise its powers to implement the Current Rule retroactively through adjudication.

In short, as demonstrated herein, the Regional Director's reliance on eliminated regulatory authority to continue to block and deprive the petitioning employees of their right to an election is unjustified, and the Regional Director should be ordered to immediately resume the processing of the Pacoima Petition in accordance with the current Section 103.20.

## II. FACTUAL SUMMARY AND PROCEDURAL HISTORY.

### A. Athens' Business and History.

Athens has been providing waste collection and recycling services in Southern California for over 60 years. Founded in 1957, Athens began as a small family-run business with one truck in the Athens District of Los Angeles. Athens is still a family-run company today, but it now employs nearly 1,600 employee's companywide and has grown into one of the largest independent (non-national) waste collection companies in the Los Angeles area with a significant percentage of the City of Los Angeles ("City") market share.

### B. The Los Angeles Franchise and the Labor Peace Agreement.

Waste collection in the City had historically been a competitive open market in which consumers could contract with any hauler they chose to service their waste collection needs. This changed, however, on May 28, 2014, when the City implemented the Franchises for the Collection, Transportation and Processing of Commercial and Multifamily Solid Waste Ordinance

("Franchise Ordinance") following extensive support and lobbying efforts by the Union. *See* Los Angeles Municipal Code §§ 66.03 *et seq*. The Franchise Ordinance divided the City into 11 waste-hauling zones, and after a bidding process, the City awarded exclusive hauling rights in each zone to seven different trash haulers. This new law constituted a significant potential threat to Athens' business and market share.

To qualify for a franchise, all non-union trash haulers had to enter into a "labor peace agreement" with any union that seeks to represent its employees (without any showing of interest). *See* Los Angeles Municipal Code §§ 66.03 *et seq*. Thus, after the Union made such a request, Athens entered into the LPA with it on June 5, 2015. Thereafter, the City awarded Athens three different franchise zones enabling it to keep roughly the same amount of business it had before the Union-supported change in law. The work for the City franchise contracts is being performed out of the three Athens Yards – the Torrance Yard, the Pacoima Yard and the Peoria Yard (collectively "LA Yards").

In order for Athens to obtain the legally required LPA, the Union insisted on access to the LA Yards and a card check provision, which would compel Athens to recognize the Union as its employees' bargaining representative without a secret-ballot election if the Union obtained signed authorization cards from at least 50 percent of the employees at any LA Yard. The LPA also contractually required Athens to waive its Section 8(c) rights and remain neutral with respect to whether employees should unionize.

Again, Athens would not have been able to continue doing business in Los Angeles and would have lost millions of dollars of business had it not agreed to enter the LPA.

### C. The Union Submits Cards for Card Checks.

On February 14, 2017, Local 396 notified Athens of its intent to organize the employees at the LA Yards. Throughout the organizing campaign, Athens provided the Union with access to its yards and strictly complied with its neutrality commitment. Seven months later, on September 6, 2017, the Union requested recognition and, following a card check, Athens per the LPA recognized the Union as the exclusive bargaining representative of the three bargaining units on September 28, 2017.[1]

### D. Employees Complain About Card Check Recognition.

Shortly after voluntary recognition, managers and supervisors at the LA Yards began receiving alarming reports from employees. Many employees lamented that they were deceived or coerced by the Union's solicitation tactics and they did not want to be represented by the Union. Some employees reported that the Union affirmatively misrepresented the impact of signing an authorization card and they did not understand they were authorizing the Union to act as their exclusive representative by signing the card, while others reported that the Union used high pressure tactics to coerce them into signing the card. Despite these recurring and disconcerting reports, Athens' managers and supervisors adhered to the LPA's neutrality mandate and invariably responded that Athens must remain neutral and cannot advise employees on how to redress their grievances.

[1] Prior to this date, none of Athens' employees had been previously represented by any union – with this recognition, approximately 400 of the roughly 1,600 Athens employees became unionized. As of the date of the initial petitions there were 270 employees in the Pacoima Unit, 16 employees in the Peoria Street Unit and 95 employees in the Torrance Unit.

### E. Employees at Each LA Yard File a Petition Seeking a Decertification Election.

Nine months after voluntary recognition, employees in each of the three separate bargaining units initiated decertification proceedings. On July 6, 2018, Ernesto Calvillo filed the Pacoima petition in 31-RD-223309 to decertify the Union as the exclusive representative of the unit at the Pacoima Yard. That same day, Julio Porres filed a petition in 31-RD-223335 to decertify the Union as the exclusive bargaining representative of the unit at the Peoria Yard, and John Lopez filed a petition in 31-RD-223318 to decertify the Union as the exclusive bargaining representative of the unit at the Torrance Yard. The Regional Director promptly started processing the petitions and scheduled a Representation Hearing.

### F. The Union Files Tactical Blocking Charges Strategically Timed to Delay the Processing of each of the RD Petitions.

As detailed in Athens' Request for Review filed on February 21, 2020, over the course of the five years, from the imposition of the LPA to the filing of the RD Petitions, the Union did not file a single unfair labor practice charge or arbitration claim[2] against Athens. To the contrary, the parties bargained hard in good faith for an initial contract – and were in fact still engaged in those negotiations at the time the RD Petitions were filed.

Yet, shortly after the RD Petitions had been filed, the Union embarked on a strategic campaign to delay the election by filing a series of meritless blocking charges.[3] The first charge was filed a mere 11 days after the decertification petitions. Despite the priority nature of the

[2] Under the LPA, if the Union believes Athens has violated the provisions of the LPA, for example, by interfering with employees' union activities or violating the neutrality provision, the Union can file for expedited binding arbitration.

[3] As explained in detail below, the meritless nature of these blocking charges was confirmed by Administrative Law Judge Jeffrey D. Wedekind who dismissed the majority of allegations and characterized the four sustained allegations as "minor," hypertechnical violations precipitated by the Union's own misconduct.

charge, the Region took months to complete its investigation, ostensibly because the Union delayed its presentation of evidence. Then, just as the Region was about to conclude its investigation and unblock at least one petition, the Union filed a new blocking charge targeting the petition set to be unblocked. Evidencing its transparent manipulation of the blocking charge policy even further, the Union's new blocking charge involved the same time period and the same employee as the prior blocking charges, and could have easily been raised when the initial charge was filed.

This pattern of serially filing stale allegations that could have easily been raised in the initial blocking charge just as the Region was set to wrap its investigation continued for eight months, and because of the Union's blatant abuse of the blocking charge policy, the operative consolidated complaint did not issue until May 29, 2019, nearly a full year after the petitions had been filed.

See Respondent's Request for Review filed on February 21, 2020 for a more detailed explanation of how the Union abused and manipulated the blocking charge policy to delay the election and deprive employees of their right to vote on union representation.

### G. After the ALJ Dismisses Most of the Allegations and Finds No Union Animus, the General Counsel Appeals.

On December 30, 2019, Judge Wedekind issued his written decision, which was nothing short of a complete vindication for Athens. Two of the Athens locations – Peoria and Torrance – were *fully cleared*, and all of the discriminatory discipline/discharge allegations *at all three yards* were dismissed. Although Judge Wedekind sustained four minor allegations at the Pacoima Yard

related to two distinct, isolated post-petition events, he expressly noted these were "unintentional," technical violations based on a "misunderstanding" precipitated by the Union's own misconduct.

Most importantly, Judge Wedekind expressly noted that none of the allegations, either dismissed or sustained, were indicative of union animus. *See, e.g.*, Ex. 1, ALJ Decision, at 20 ("In sum, contrary to the General Counsel, there is insufficient evidence that the Company had animus against the employees' protected union activities…"); *see also, e.g.*, Ex. 1, ALJ Decision, at 49:30-33 ("Finally, there is no other substantial direct or circumstantial record evidence of bad faith or an intent to frustrate agreement. Contrary to the General Counsel, the evidence fails to establish that the Company engaged in a course of conduct at its yards designed to discourage pro-Union activity and interfere with their statutory rights.")(internal quotations and citations omitted).

Despite Judge Wedekind's powerful exoneration of Athens, on February 14, 2020, the Counsel for the General Counsel ("General Counsel") appealed the dismissed allegations blocking the Pacoima Petition.[4] That appeal is currently pending before the Board.

### H. <u>After the Regional Director Refuses to Lift the Block, Athens Files a Request for Review.</u>

On February 19, 2020, without any substantive reasoning, the Regional Director notified the parties that she decided to continue the block of the Pacoima Petition and deprive the Pacoima employees of the right to vote through the pendency of the exceptions. Thereafter, on February 21, 2020, Athens filed a Request for Review seeking an order that the Regional Director lift the block and process the Pacoima Petition because, as Judge Wedekind's decision plainly showed,

[4] In an effort to delay the petitioned-for elections at Torrance and Peoria even further, the Union also excepted to the Torrance and Peoria allegations, however, the Regional Director properly resumed processing of these petitions. On June 19, 2020, after a mail ballot election, the ballots were tallied. Approximately 75 percent of employees *at both yards* voted overwhelming to decertify the Union. The Union did not object to the election results, which were certified on June 30, 2020. *See* Cases 31-RD-223335 and 31-RD-223318.

neither the sustained allegations nor the dismissed allegations on appeal would impact employees' fair and free choice in an election.

## I. The Board Publishes the Final Rule on Blocking Charges.

On April 1, 2020, the Board issued its final rule reforming the blocking charge policy, which amends Section 103.20 of the Board's Rules and Regulations. Rules and Regulations, § 103.20; 85 Fed. Reg. 18366 (April 1, 2020). The Current Rule has completely eliminated the unjust practice of allowing unproven unfair labor practice allegations to block an election until the allegations are finally adjudicated. 85 Fed. Reg. 18366, 18370 ("In short, under the final rule, the filing of a blocking-charge request will not delay the conduct of an election but may delay the vote count or certification of results. The regional director shall continue to process the petition and conduct the election."). These revisions expressly revoked regional directors' authority to completely suspend the processing of a petition through a timely election. Rather, in all cases, the Board will now conduct an election as expeditiously as possible and, in most cases, the Board will count the votes without delay in accordance with ordinary election procedures. In limited circumstances not present here, the Board will impound the votes, but even then, "to avoid a situation where employees are unaware of the election results indefinitely," the Board has imposed reasonable time limits on the impoundment period and has expressly eliminated the ability to extend the time limit through serial filing, like the Union here repeatedly did.

The Current Rule went into effect on July 31, 2020.

## J. Board's Ruling on Athens' Request for Review.

On May 27, 2020, the Board denied Athens' Request Review, finding the Regional Director's action did not constitute an abuse of discretion under then current law. In doing so,

however, the Board acknowledged this case exemplified the powerful need for blocking charge reform:

> Although **we are troubled by the extreme delay in processing the petition**, the circumstances currently before us fall short of establishing that the Regional Director abused her discretion under current law. **We observe, however, that the Regional Director's decision in this regard raises many of the concerns that led the Board to recently adopt changes to the blocking charge policy.** See 85 Fed. Reg. 18366 (Apr. 1, 2020).Those amendments are not effective until July 31, 2020, however. 85 Fed. Reg. 20156 (Apr. 10, 2020).

Board's Denial of Request for Review, dated May 27, 2020, at page 1 (emphasis added).

Since the Current Rule would not be in effect until July 31, 2020, the Board found Athens' request was premature. However, as indicated by the last line of the decision, once the Current Rule took effect at the end of July, continuation of the block would no longer be justified.

**K. Regional Director Denies Athens' Request to Lift the Block.**

Following the implementation of the Current Rule, on August 3, 2020, Athens requested that the Regional Director resume the processing of the Pacoima Petition and expeditiously schedule the election. On August 5, 2020, the Regional Director denied Athens' request and decided to continue the block. Citing the APA's prohibition against retroactive laws and the Board's failure to explicitly state whether the Current Rule should be applied retroactively, Regional Director concluded that the Current Rule could not be applied to the Pacoima Petition. Attached hereto as Exhibit 1 is the August 5, 2020 Decision to Continue the Block of the Pacoima Petition.

The Regional Director's decision to continue the block is based on an erroneous interpretation of the law. Applied to the Pacoima Petition, the Current Rule would not be unlawfully retroactive because it is merely procedural. Moreover, the Regional Director's

interpretation would lead to unlawful disparate treatment under the law, one in which any similarly situated petitioner can invoke the Current Rule, but the Pacoima Petitioner and Athens cannot.

The Regional Director's decision not only rests on an erroneous and unlawfully disparate interpretation of the law, but it also exhibits a fundamental misunderstanding of the nature of the determination to block. The determination to block a petition is not intended to be a one-time, inflexible decision. It is meant to be a dynamic evaluation that adapts to evolving circumstances. As such, a blocking determination cannot be justified based on a policy that no longer exists as maintaining the Block is in and of itself an administrative action which requires valid regulatory authority.

Finally, even if the Board were to agree with the Regional Director's view of the APA, it should make the Current Rule retroactive through its adjudicatory powers. Any rule that can be enacted through rulemaking can be likewise enacted through adjudication, and the Board's power to make a rule retroactive through adjudication absent a manifest injustice is well established. Not only would retroactive application of the Current Rule not create a manifest injustice, it would prevent one, and for that reason, it is both appropriate and essential that the Board exercise its adjudicatory powers to make the Current Rule retroactive.

## III. ANALYSIS.

### A. Application of the Current Rule To The Pacoima Petition Is Not Unlawfully Retroactive.

The Regional Director's refusal to process the petition and conduct an election pursuant to the Current Rule is arbitrary and capricious and departs from applicable authority.

The Regional Director concluded that "Rule 103.20 does not govern the processing of this petition" because the application of the rule to this case would constitute "retroactive application

of administrative rules." Exhibit 1 at p. 1. In support of her erroneous conclusion, the Regional Director primarily relies upon *Bowen v Georgetown Hospital*, 488 U.S. 204 (1988), a case in which the Supreme Court invalidated a rule promulgated by Department of Health and Human Services that required private hospitals to refund Medicare payments rendered before promulgation of the rule. However, in order to make her case, the Regional Director conveniently, and necessarily, ignores well established Supreme Court precedent that clarifies application of procedural rules, like the Current Rule, to pending cases is not considered retroactive.

Following *Bowen*, the Supreme Court clarified that "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment…or upsets expectations based in prior law." *Landgraf v. USI Film Products*, 511 U.S. 244, 269 (1994). A statute only operates retroactively where it "attaches new legal consequences to events completed before its enactment." *Id.* at 270. Stated another way, "[t]he difference has to do with whether there is a change in substantive obligation as opposed to a change in the way in which the same obligation is adjudicated." *Combs v. Commissioner of Social Security*, 459 F.3d 640, 647 (6th Cir. 2006) (finding under *Landgraf* that the rule promulgated by the Social Security Administration that changed the adjudication of disability benefit claims was not impermissibly retroactive because the rule affected procedural rather than substantive rights).

In this regard, the Supreme Court has long held that procedural rules which merely change an agency's processes are not retroactive. As stated in *Landgraf*:

> Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity…Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule retroactive.

*Landgraf*, at 275. Thus, where a newly enacted rule alters an agency's procedures, as opposed to the legal consequences for past acts of the parties, "a court should apply the law in effect at the time it renders its decision [citation] even though that law was enacted after the events that gave rise to the suit." *Landgraf* at 274 (quoting *Bradley v. School Bd. Of City of Richmond*, 416 U.S. 696, 711 (1974)).

Giving the Current Rule effect to pending petitions is not retroactive because the Current Rule does not render any pre-July 31, 2020 block illegal or inappropriate, nor does it affect the validity of the petition, the merits of pending unfair labor practice charges or the ultimate consequences for meritorious unfair labor practice charges. The Current Rule only entails a *procedural* change to the Board's processes – specifically, when a petition will be processed through election despite pending unfair labor practice charges – and merely requires regional directors to process all petitions going forward in a manner consistent with Section 103.20 and their current regulatory authority. *See* 85 Fed. Reg. 18366, 18367 (noting that the purpose of the Current Rule is "to eliminate the current blocking-charge policy and to adopt a 'vote-and-impound' **procedure**. Under that **procedure**, regional directors would continue to process a representation petition and would conduct an election even when an unfair labor practice charge and blocking request have been filed." (emphasis added)).

In fact, unlike prohibited retroactivity which imposes an obligation or consequence on an individual or business related to a past action or inaction, the revised Section 103.20 only removes the government's regulatory authority to a block a petition from the effective date forward. It is axiomatic that once the regulatory authority for a government agency's action is removed, the agency can no longer engage in that action in the future. Yet, this is precisely what the Regional

Director's decision does – she is blocking the processing of the Pacoima Petition even though the Board expressly eliminated her regulatory authority to do so.

Accordingly, application of Section 103.20 to pending petitions does not violate the APA, and the Regional Director's refusal to process the petition and conduct an election under the Current Rule constitutes arbitrary and capricious action and a failure to adhere to binding authority, and must be reversed.

### B. The Regional Director's Interpretation Is Arbitrary and Capricious Because It Leads to Disparate Treatment Under the Law.

The Regional Director's decision is also arbitrary and capricious because it leads to disparate treatment under the law. Under both the Fourteenth Amendment's Equal Protection Clause and the APA, agencies cannot treat similarly situated petitioners different without a sufficient justification. U.S.C.A. Const. Amend. XIV; 5 USC § 551 *et seq.*; *ANR Storage Co. v. Fed. Energy Regulatory Comm'n*, 904 F.3d 1020, 1024 (D.C. Cir. 2018); *Muwekma Ohlone Tribe v. Kempthorne*, 452 F. Supp. 2d 105, 115 (D.D.C. 2006). Yet, under the Regional Director's interpretation, any similarly situated petitioner could invoke the Current Rule and obtain an election, but the Pacoima Petitioner cannot. Thus, Regional Director's interpretation would treat similarly situated petitioners more favorably than the Pacoima Petitioner.

More specifically, the Current Rule expressly precludes a union from blocking an election with an unfair labor practice filed prior to the petition, which means that if the Pacoima Petition were filed today under the exact same circumstances, the Union could not block the petition with the Charges currently on appeal (or any new charges for that matter). Rules and Regulations, § 103.20. Consequently, any similarly situated petitioner who filed a petition after July 31, 2020 would receive more favorable treatment under the law than the Pacoima Petitioner because, no

matter how similarly situated the petitioners were, the post-Current Rule petition would be expeditiously processed; whereas, the pre-Current Rule Pacoima Petition would languish in abeyance for an indeterminate amount of time while the Charges wind their way through the adjudicatory process. In fact, were a similarly situated petitioner to file a petition today, that petition would, in all reasonable likelihood, proceed to an election quicker than the Pacoima Petition. Such disparate treatment is clearly arbitrary and capricious.

These are patently inequitable results that are impermissible under the United States Constitution and the APA. Accordingly, the Board should grant this Request for Review and order the Regional Director to process the Pacoima Petition as directed by Section 103.20.

### C. The Regional Director's Interpretation Does Not Conform To a Logical Reading of the Current Rule.

The Regional Director contends her decision ensures internal consistency between the Current Rule and Sections 103.21 and 103.22, both of which expressly state that the modified rules only apply to voluntary recognitions extended on or after July 31, 2020. Once again, this conclusion is based on a fundamental misunderstanding of the law. As noted above, under Supreme Court precedent, governmental agencies must apply newly enacted procedural rules to all matters, irrespective of whether the conduct at issue in the matter arose before the rule went into effect, unless doing so would result in a manifest injustice. *Landgraf*, at 275. Both Sections 103.21 and 103.22 are procedural rules that govern how petitions are processed. Accordingly, under prevailing Supreme Court precedent, Sections 103.21 and 103.22 would ordinary be applied to any matter regardless of when the recognition was extended. However, the Board intentionally eliminated this possibility with express language in both Sections. Rules and Regulations, §§ 103.21(b) and 103.22(b). The Board did not do the same with respect to the Current Rule – even

though it could have. It must be presumed that such an omission was purposeful, and by not including language in the Current Rule that expressly precludes its application to blocked petitions pending as of July 31, 2020, the Board evidenced its intent that the Current Rule would apply to such petitions.

The Board's intent to apply the Current Rule to all pending petitions is further evidenced by the fact that the language in Section 103.22(b) was not in the proposed rule, but rather, was added by the Board after the notice and public comment period. In adding this language, the Board stated:

> Some commenters argue that the Board should apply the rule only to construction-industry bargaining relationships entered into on or after the date the rule goes into effect. We agree, and we have modified the regulatory text to specify that the rule applies only prospectively to voluntary recognition extended on or after the effective date of the rule and to any collective-bargaining agreement entered into on or after the date of voluntary recognition extended on or after the effective date of the rule.

85 Fed. Reg. 18366, 18390.

In other words, the Board added the language in Section 103.22(b) because, without it, Section 103.22 would have been applied to voluntary recognitions extended before the effective date of Section 103.22. The Board's decision not to amend the proposed rule on Section 103.20, like it did with the proposed rule on Section 103.22, further substantiates the Board's intent that Section 103.20 to apply to all blocked petitions pending as of July 31, 2020.

The Regional Director also argues that her determination is consistent with the Board's prospective because the Board stated in the final rule that, by revising the old blocking charge policy via rulemaking, "the Board would enable employers, union, and employees to plan their affairs free from the uncertainty that the legal regime may change on a moment's notice (and

possibly retroactively) through the adjudication process." 85 Fed. Reg. 18366. However, at best, this statement merely reflects the undeniable fact that changing a rule via adjudication does not afford employers, union and employees with advanced notice like rulemaking does. It certainly does not evince an intent by the Board not to follow ordinary cannons of construction in which newly enacted procedural rules are applied to pending matters, and this is particularly true given that the Board did not include language expressly eliminating the application of Section 103.20 to blocked petitions pending as of the effective date of the Current Rule, even though it included language to that effect in both Sections 103.21 and 103.22.

In short, nothing in the Board's Final Rule indicates that the Current Rule was not intended to apply to blocked petitions pending as of the effective date of the Current Rule. In fact, the absence of language similar to Sections 103.21(b) and 103.22(b) in the Current Rule shows the Board actually intended the Current Rule to apply to such pending blocked petitions. Thus, the Board should grant this Request for Review and order the Regional Director to process the Pacoima Petition as directed by Section 103.20.

### D. The Regional Director Has A Duty to Reassess Her Blocking Determination Under the Current Rule Now In Effect.

Even if the Current Rule was not applicable to the Regional Director's pre-Rule blocking determination, the Regional Director has a duty to reassess the blocking determination under the Current Rule now in place. The Casehandling Manual makes clear that, even under the old rule, the decision to block a petition is not a decision that a regional director makes once and never again. Casehandling Manual, Part Two, Representation Proceedings, § 11730.4 ("In implementing the [old] blocking charge policy, the regional director should assess, throughout the steps of processing the charge and the petition, whether the charge blocks the petition."); *see also*

§11731.1(b) (if the charging party seeks to rescind the request to block the petition, the regional director must re-evaluate the decision to block). Rather, the decision to block a petition is a fluid, ongoing evaluation based on then-present circumstances, and a regional director has an ongoing duty to reassess the blocking determination as circumstances change and the charge and petition progresses through the various stages of the Board's processes. *Id.* Indeed, any other rule would undermine the core purposes of the Act, which "manifest[s] a consistent and powerful concern with the expeditious resolution of questions concerning representation, as has been recognized in Supreme Court opinions and in the relevant legislative history." Representation—Case Procedures, 79 Fed. Reg. 74307, 74422 (Dec. 15, 2014).

Thus, the Regional Director here has a duty to reevaluate her blocking determination based on today's present, and materially different, circumstances. Specifically, the Current Rule has wholly eliminated the purely procedural policy and authority upon which the Regional Director had justified her prior decision to block the Pacoima Petition. Because the blocking determination is a dynamic evaluation that is intended to change as circumstances change, the Regional Director simply cannot maintain a block; she must reevaluate it constantly. Even if the Regional Director properly adhered to just this mandate, the reevaluation based on present circumstances would mandate removal of the block as her authority to maintain the block no longer exists. Indeed, to hold otherwise would lead to illogical and inequitable results.

Accordingly, pursuant to her duty under the Casehandling Manual, the Board should order the Regional Director to reassess the propriety of the block of the Pacoima Petition under the Current Rule.

### E. The Board Has the Authority To Make The Current Rule Retroactively Applicable Through Adjudication of this Request for Review.

Even if the Board were to decide application of the Current Rule to this case would be impermissibly retroactive, the Board should exercise its authority to make the standard retroactive through the adjudicative process. The Board has the power to implement rules through either the rulemaking process or adjudicative process. *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294 (1974). As stated by the Supreme Court, "The NLRB is not precluded from announcing new principles in an adjudicative proceeding, and the choice between rulemaking and adjudication lies in the first instance within the Board's discretion." *Id.* When the Board implements rules through adjudication, the Board's "usual practice is to apply new policies and standards retroactively 'to all pending cases in whatever stage" unless doing so would work a "manifest injustice." *SNE Enterprises*, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–1007 (1958)); *Cristal USA, Inc*. 368 NLRB No. 137, slip op. at 1-2 (2019). Thus, even though the Board developed and implemented the Current Rule through the notice and public comment rulemaking process set forth in the APA, the Board has equal authority to implement a similar standard retroactively through adjudication so long as it would not work a manifest injustice.

Here, far from perpetuating a manifest injustice, applying the Current Rule standard retroactively through adjudication would *prevent* a manifest injustice because, were it not applied retroactively, the Pacoima Petition will remained blocked for months or potentially years longer. As detailed above, the Pacoima Petition was filed in July 2018 and has been blocked for an astounding 25 months and counting. Judge Wedekind found no merit to the overwhelming majority of the blocking charge allegations, and dismissed all but four minor allegations

precipitated by the Union's own misconduct. Athens did not appeal the adverse findings against the company, but the General Counsel appealed the allegations dismissed by Judge Wedekind, and therefore, due only to the voluntary actions of the General Counsel, the Pacoima Petition has remained blocked during the pendency of the appeal. Moreover, should the General Counsel lose on appeal, the Pacoima Petition could remained blocked through the federal court appeal process as well. Even more unjust, the Pacoima Petition will remained blocked even though, had it been filed today under the exact same circumstances, those same charges would not block it.

The indefinite block of the Pacoima Petition is a travesty of justice that the Board should not tolerate. Accordingly, should the Board find the Current Rule implemented through rulemaking does not apply to this case, the Board should order that the Current Rule standard be applied retroactively through its adjudicatory powers.

## IV. CONCLUSION.

The Regional Director's decision not to apply Section 103.20 to the Pacoima Petition is based on an erroneous interpretation of the law. The APA does not preclude application of Section 103.20 to the Pacoima Petition because Section 103.20 merely affects the procedure of when and how petitions are processed. It does not change the legal consequences for past behavior; it only removes the Regional Director's authority to suspend and block elections beyond July 31, 2020. Moreover, applying Section 103.20 as the Regional Director does leads to disparate treatment of the Pacoima Petitioner.

Even if this were not the case, the determination to maintain a block on a representation petition is intended to be a fluid evaluation that adapts to changed circumstances. Accordingly, under the Board's Rules and Regulations, the Regional Director has a duty to reevaluate the block

under the Board's new policy, as set forth in Section 103.20, and cannot stand on a policy that no longer exists.

Finally, even if the Board were to decide that application of Section 103.20 to the Pacoima petition would be impermissibly retroactive, the Board can and should establish an identical retroactive policy through this adjudicatory process.

For these reasons, Respondent respectfully requests that the Board order the Regional Director to unblock the Pacoima Petition and finally allow these employees to exercise their right to vote.

Dated: August 13, 2020

EPSTEIN, BECKER and GREEN, P.C.

By: _____

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## PROOF OF SERVICE

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My business address is 1925 Century Park East, Suite 500, Los Angeles, CA 90067-2506.

3. I served copies of the following documents (specify the title of each document served):

**EMPLOYER ARAKELIAN ENTERPRISES, INC.'S REQUEST FOR EXTRAORDINARY RELIEF AND REVIEW OF REGIONAL DIRECTOR'S DECISION TO BLOCK RD PETITION**

4. I served the documents listed above in item 3 on the following persons at the addresses listed:

*Counsel for the General Counsel*

Amanda W. Laufer
Christine Flack
National Labor Relations Board, Region 31
11500 W. Olympic Blvd., Ste. 600
Los Angeles, CA 90064
Tel: (310) 307-7337
Fax: (310) 235-7420
amanda.laufer@nlrb.gov
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*Counsel for the International Brotherhood of Teamsters, Local 396*

Paul L. More
Attorney at Law
McCracken, Stemerman & Holsberry LLP
595 Market Street, Suite 800
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*Petitioner*

Ernesto Calvillo
pde667@hotmail.com

5.

a. ☐ **By Personal Service**. I personally delivered the documents on the date shown below to the persons at the addresses listed above in item 4.

☐ **By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 4 and:

1. ☐ placed the envelope for collection and mailing on the date shown below, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Los Angeles, California.

☐ **By messenger service.** I served the documents on the date shown below by placing them in an envelope or package addressed to the person on the addresses listed in item 4 and providing them to a professional messenger service for service. (A

declaration by the messenger must accompany this proof of service or be contained in the Declaration of Messenger below.)

☒ **By e-mail or electronic transmission.** I caused the documents to be sent on the date shown below to the e-mail addresses of the persons listed in item 4. I did not receive within a reasonable time after the transmission any electronic message or other indication that the transmission was unsuccessful.

2. I served the documents by the means described in item 5 on (*date*): **August 13, 2020**.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

| 8/13/20 | Stephanie Alvarez | */s/ Stephanie Alvarez* |
|---|---|---|
| DATE | (TYPE OR PRINT NAME) | (SIGNATURE OF DECLARANT) |